

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEW YORK UNIVERSITY
Employer
and

Case 02-RC-023481

GSOC/UAW
Petitioner

POLYTECHNIC INSTITUTE
OF NEW YORK UNIVERSITY
Employer
and

Case 29-RC-012054

INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE,
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
Petitioner

BRIEF OF THE PETITIONER

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I. INTRODUCTION

These two cases raise the question of whether individuals who do work that benefits a college or university, who are paid for doing that work, and who pay taxes on their earnings are “employees.” Both of these petitions were dismissed on the authority of Brown University, 342 NLRB 483 (2004) because the individuals in question are students enrolled at the universities where they work. The Board in Brown categorically declared “the federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act,” 342 NLRB at 493, overruling the unanimous decision issued just four years earlier in New York University, 332 NLRB 1205 (2000) (NYU I). Brown purported to return to earlier cases that supposedly held that graduate assistants¹ are not employees because they are “primarily students.” In fact, however, prior to Brown, the Board had never held that graduate assistants are not employees. As discussed below in Part III. A., in the cases that the Brown majority purported to rely upon, the Board simply held that graduate assistants lack a community of interest with faculty members. None of those cases found that graduate assistants were not employees. On the contrary, Brown cannot be reconciled with the long history of Board decisions recognizing various categories of student workers, including apprentices, to be statutory employees. This reflects the simple reality that there is no inconsistency between being a student and being an employee. It is possible to work and to learn at the same time.

¹ The term “graduate assistant” is used in these cases and herein to refer collectively to graduate students who work for the university in which they are enrolled as students. This term includes those who teach (teaching assistants or TAs), those who do research (research assistants or RAs), and those who perform a variety of other services for the University in their departments and/or related to their education (graduate assistants or GAs). See, e.g., NYU I, 332 NLRB at 1205.

The Board should overrule Brown and return to the holding of NYU I that “workers who are compensated by, and under the control of, a statutory employer” should not be deprived of their rights under the NLRA “simply because they are also students.” 332 NLRB at 1209.

In each of these cases, the Graduate Student Organizing Committee of the UAW² seeks to represent a unit composed of graduate student assistants.³ In New York University, Case No. 2-RC-23481, the Acting Regional Director concluded that graduate assistants perform services for the university (“NYU”) under the direction and control of the University and that they are compensated by the University for performing those services. He further concluded that the services are related to the graduate assistants’ education. Accordingly, he concluded that the graduate assistants are both employees and students. He held that, were it not for Brown, a unit comprised of graduate students classified as adjunct faculty, Research Assistants (“RAs”) and certain hourly-paid graduate students would be appropriate for purposes of collective bargaining. Nevertheless, he decided that he was constrained by Brown to dismiss the petition. The Petitioner requested review of the dismissal of the petition.

In Polytechnic Institute of New York University, Case No. 29-RC-12054, the Union sought to represent a unit of graduate student employees classified as “graduate

² The Petitioner in both cases is the same entity. The Regional Director for Region 29 refused to permit the Petitioner to proceed using any name other than the full name as it appears in the UAW Constitution. The Petitioner did not request review of that determination. The terms “the UAW” and “the Union” as used herein refer to the Petitioner in both cases.

³ The Employer in New York University, Case No. 2-RC-23481, argued that student-employees who perform functions traditionally performed by Teaching Assistants (“TAs”) are not graduate assistants within the meaning of Brown because the Employer chose to classify them as adjunct faculty, rather than TAs, and because it has labeled their pay a salary rather than a stipend. The Acting Regional Director for Region Two concluded that these superficial labels did not alter the status of these individuals as simultaneously students and common law employees who are therefore graduate assistants within the meaning of Brown.

assistants" ("GAs"), TAs and RAs. The Regional Director found that the employees in all of these categories have both an economic and an academic relationship to the university ("Poly"). He concluded that the GAs, RAs, and TAs share a community of interest. Nevertheless, like the Acting Regional Director for Region Two, he dismissed the petition on the authority of Brown. He further concluded, contrary to the Acting Regional Director for Region Two, that if Brown were to be overruled, the RAs would still not be considered to be employees because Poly receives external funding that it uses to pay the RAs for their work. Finally, he rejected the university's argument that the GAs and the TAs are temporary employees who do not have the right to organize. Again, the Petitioner requested review of the dismissal of this petition.

On June 22, 2012, the Board granted the UAW's requests for review in both cases. The Board also granted NYU's conditional request for review to the extent that it raises questions concerning the Acting Regional Director's findings regarding the scope of the bargaining unit, and it granted Poly's conditional request for review of the Regional Director's conclusion that GAs and TAs would not be precluded from organizing because of their temporary status.

The same day, the Board issued an order consolidating these cases for the filing of briefs and invited briefs on four issues:

1. Should the Board modify or overrule Brown, which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the Act, because they "have a primarily educational, not economic, relationship with their university?"
2. If the Board modifies or overrules Brown, should the Board continue to find that graduate student assistants engaged in research

funded by external grants are not statutory employees, in part because they do not perform a service for the university?

3. If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?

4. If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees and (b) what the appropriate unit placement of assistants determined to be temporary employees should be?

This brief is submitted on behalf of the Petitioner in both cases in response to that invitation.

II. FACTS

A. New York University

The Petitioner seeks to re-establish the bargaining relationship that existed before Brown withdrew the Act's protection from graduate assistants. Following the decision in NYU I, the UAW was certified as bargaining agent for a unit of teaching assistants, research assistants and graduate assistants (collectively referred to as graduate student assistants) employed by the Employer (NYU Dec. 7).⁴ As the Acting Regional Director found, the parties successfully negotiated a collective bargaining agreement covering that bargaining unit, which was effective by its terms for the period September 1, 2001 through August 31, 2005 (Dec. 7). That contract covered, *inter alia*, the stipends and benefits received by graduate student employees. The contract also

⁴ References to the Acting Regional Director's Decision and Order Dismissing Petition in Case No. 2-RC-23481 shall be designated as "NYU Dec." followed by page number. References to the Regional Director's Decision and Order in Case No. 29-RC-12054 shall be designated as "Poly Dec." followed by page number.

included a "Management and Academic Rights" clause to protect the academic mission of the University:

A. Management of the University is vested exclusively in the University. Except as otherwise provided in this Agreement, the Union agrees that the University has the right to establish, plan, direct and control the University's missions, programs, objectives, activities, resources, and priorities; to establish and administer procedures, rules and regulations, and direct and control University operations; to alter, extend or discontinue existing equipment, facilities, and location of operations; to determine or modify the number, qualifications, scheduling, responsibilities and assignment of graduate assistants; to establish, maintain, modify or enforce standards of performance, conduct, order and safety; to evaluate, to determine the content of evaluations, and to determine the processes and criteria by which graduate assistants' performance is evaluated; to establish and require graduate assistants to observe University rules and regulations; to discipline or dismiss graduate assistants; to establish or modify the academic calendars, including holidays and holiday scheduling; to assign work locations; to schedule hours of work; to recruit, hire, or transfer; to determine how and when and by whom instruction is delivered; to determine in its sole discretion all matters relating to faculty hiring and tenure and student admissions; to introduce new methods of instruction; or to subcontract all or any portion of any operations; and to exercise sole authority on all decisions involving academic matters.

B. Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University.

(NYU Pet. Ex. 6, pp. 19-20).

Before the Board issued its decision in Brown, NYU publicly proclaimed that this contract language protected the university's academic freedom and interests. For example, a memorandum to "The University Community" from Robert Berne, the Employer's Vice President for Academic and Health Affairs, specifically noted that the agreement "achieves all" of the aims the University identified at the start of negotiations,

including "the primacy of our fundamental academic mission, values and prerogatives." (NYU Pet. Ex. 7). Similarly, a press release noted that "[t]he agreement reaffirms fundamental academic prerogatives of the University," and quoted NYU President Dr. L. Jay Oliva's statement that "I am very pleased at the outcome of these efforts." (NYU Pet. Ex. 7).

This attitude changed markedly in the aftermath of Brown. As the expiration date of the collective bargaining agreement approached, the Provost, David McLaughlin, asked the Faculty Advisory Committee on Academic Affairs to submit a recommendation as to whether the University should withdraw recognition from the Union. The committee's report found that collective bargaining had produced improvements in earnings, benefits and working conditions that should be preserved (NYU Dec. 8). "The Committee recognizes, moreover, that the process of negotiating a union contract facilitated progress on a number of these matters" (NYU Er. Ex. 39, p.1). Nevertheless, in order to take advantage of Brown, the committee concluded, "Graduate students make vital contributions to the university in their roles as teaching assistants, graduate assistants and research assistants, but graduate students should be regarded, first and foremost, as students, apprentice researchers, and trainees of their faculty mentors, rather than as employees"⁵ (NYU Dec. 8; Er. Ex. 39, p. 1-2).

The administration also commissioned a report by the Senate Academic Affairs Committee and Senate Executive Committee on whether the university should continue to engage in collective bargaining with the Union. While this report suggested that NYU

⁵ The Faculty Advisory Committee's recognition that RAs are "apprentice researchers" was at least an implicit recognition that graduate assistants are engaged in both a course of study and service to the University – that is, that they have a dual role as students and employees. As discussed below in Part III.A., the Board has long recognized that apprentices are employees, even as they learn.

withdraw recognition, it again found that collective bargaining had produced numerous positive results that should be retained (NYU Dec. 8; Er. Ex. 38). Among the benefits of collective bargaining, the Senate Committee noted “stability and clarity of **work** expectations.” (NYU Er. Ex. 38, p. 6) (emphasis added). The only alleged negative impact of collective bargaining noted by either of these committees was the time required to respond to grievances that, in the view of the committees, had the **“potential** to impair or eviscerate management rights and academic judgment of the University....” (NYU Er. Ex. 38, p. 8; Er. Ex. 39, p.2; Dec. 8) (emphasis added).

Neither report suggested that collective bargaining had caused any **actual** harm to academic freedom. At the hearing in Case No. 2-RC-23481, NYU’s Director of Labor Relations conceded that the academic rights language of the collective bargaining agreement “provided the University with a mechanism” that protected its academic freedom. (NYU Tr. 742-43). Nevertheless, NYU withdrew recognition after the contract expired, resulting in a long strike (NYU Dec. 9; Er. Ex. 4; Tr. 138-39).⁶

Shortly after the election of President Obama, NYU initiated a change in its financial aid program which converted TAs into adjunct faculty members (NYU Tr. 372(c); Pet. Ex. 27). Prior to 2009, most graduate students who taught undergraduate students had been classified as teaching assistants and assigned to payroll code 101.

⁶ In a footnote, the Acting Regional Director found, “It does not appear that the Employer formally withdrew recognition.” (NYU Dec. 9, fn. 6). In a letter to the Union, NYU’s Director of Labor Relations stated, “[W]e are informing our community today that the University will not be negotiating a new contract with the United Auto Workers as the representatives of our graduate assistants.” (Er. Ex. 4, second page). This statement to both the Union and the University community was the withdrawal of recognition. See also NYU Tr. 138.

NYU I, 332 NLRB at 1210 (NYU Dec. 5). Compensation for their services came in the form of “stipends.” NYU I, 332 NLRB at 1210; (NYU Dec. 9). In the Fall of 2009, the largest of the schools within the University, the Graduate School of Arts and Sciences (“GSAS”), implemented “Financial Aid Reform 4” (“FAR 4”) which eliminated the connection between teaching and the payment of stipends (NYU Dec. 5-6, 9). Nevertheless, graduate students continued to teach for pay. NYU transferred them from the payroll category for teaching assistants to the payroll category for adjunct faculty and began to call them adjunct faculty (NYU Dec. 1; Tr. 376). It set their salaries based upon a collective bargaining agreement with another UAW affiliate that represents adjunct faculty (NYU Dec. 14). The Acting Regional Director found that the graduate students now classified as adjuncts continue to perform substantially the same work as they previously performed when classified as teaching assistants (NYU Dec. 15-16).⁷

The Acting Regional Director concluded that the graduate students now classified as adjuncts continue to share a community of interest with the RAs, the other large group that, together with the TAs, had comprised the bulk of the graduate assistant unit previously represented by the UAW. As discussed in greater detail below, in Part III.B., dealing with the employee status of student workers conducting research funded by external grants, he concluded that all RAs perform services that benefit NYU, and that they are paid by NYU to perform those services. Therefore, he concluded that all RAs, including those funded by external grants who had been excluded from the previous unit, should now be included in the unit if Brown were to be overruled. He also

⁷ A similar program was implemented elsewhere within the University in the Fall of 2010 (Dec. 12, fn.10).

would include certain hourly paid student employees who perform functions similar to those that had been performed by GAs included in that unit.

B. Polytechnic Institute of New York University

The UAW seeks to represent three classifications of student employees at Poly. GAs are master's degree students working in hourly-paid jobs in the Graduate Student Employment and Training ("GSET") Program, a program designed to ensure that the work performed by the GAs helps to prepare them for careers following completion of their degrees (Poly Dec. 5-7). The Employer requires GAs to complete I-9 forms, documenting their eligibility to work in the United States, and pays them through its payroll system (Poly Dec. 6-7). Most GAs work under the supervision of a faculty member. The Student Employee Handbook includes a supervisor's section that advises the supervisors that GAs are considered to be employees entitled to the protections of state and federal employment laws (Dec. 7). The student employees must report their hours worked (Dec. 7). The supervisor is responsible for ensuring that the GAs perform assigned duties and report for work during scheduled hours (Dec. 7).

TAs are PhD students, normally in the first years of their studies, who work in undergraduate "teaching laboratories." The Employer offers these laboratories to provide undergraduate students with experience conducting scientific experiments (Dec. 9, 10). TAs lay out the equipment that the undergraduate students will need for the experiments before the students arrive (Poly Dec. 9). When the undergraduate students arrive at the lab, the TAs oversee small groups of students as they conduct experiments, questioning the students to ensure that they understand what they are doing and answering their questions (Poly Dec. 9). In particular, TAs are expected to

ensure that the undergraduates follow proper safety procedures. They may also grade work of the undergraduate students (Poly Dec. 9). TAs perform these duties under the direction of a faculty member who is in overall charge of the laboratory (Poly Dec. 9). Some faculty members perform similar teaching functions in the laboratories, while others leave the TAs in charge of the laboratories (Poly Dec. 9).

The Employer supplies an appointment letter to each TA, stating the amount of the stipend to be paid for serving as a TA and informing the TA that she must work approximately 20 hours per week (Poly Dec. 9). Poly pays the TAs through its payroll system, with income taxes deducted (Poly Dec. 10).

After completing the first year of PhD studies, a student must pass a qualifying exam in order to be considered a PhD “candidate.” (Poly Dec. 10). The PhD candidate must make an oral presentation on his proposed dissertation research project and pass an oral examination to become an RA (Poly Dec. 10). The Employer issues appointment letters to RAs that are very similar to the appointment letter provided to TAs, specifying the compensation to be provided, including the monthly stipend, and requiring the RA to allocate 20 hours per week to the performance of assigned tasks (Poly Dec. 11). Like the TAs, the stipend is paid through the Employer’s payroll system, subject to income tax withholding (Poly Dec. 12).⁸

⁸ There are at least two PhD candidates at Poly who are supported by grants directly from their national governments, one from the People’s Republic of China, and one from Saudi Arabia. These individuals receive their funding directly from their governments and are not paid through the Employer’s payroll system (Poly Tr. 381). The Regional Director stated, “The Petitioner does not seek any research assistant that is funded by a foreign government.” (Poly Dec. at 5, fn. 7). While it is true that the Petitioner does not seek to represent these individuals who are funded by their home governments, the record reflects that these students are not classified as research assistants (Poly Tr. 491-92). Unlike the research assistants, these students do not perform services for Poly in exchange for compensation. The Petitioner does seek to represent all research assistants.

RAs conduct research under the direction and supervision of their thesis advisors (Poly Dec. 11). RAs typically work on a portion of a larger research project for their thesis advisors, who secure funding for the project through a grant and select students to serve as RAs on the project (Poly Dec. 11). Because RAs are typically working on a research project with their faculty advisors, much of the work performed by RAs coincides with their dissertation research (Poly Dec. 11). However, their work is not limited to their dissertation topics (Poly Dec. 11). In addition, RAs perform duties on the research project that are similar to those performed by salaried post-doctoral researchers (Poly Dec. 11). The Employer's witnesses explained that the difference between an RA and a post-doctoral researcher is that the latter is farther advanced in his knowledge and is therefore able to work with greater independence and less supervision (Poly Tr. 355, 485-86). That is, the Employer must provide more supervision to the RAs than to the post-docs, who are admitted to be employees and perform similar work.

III. ARGUMENT

A. The Board Should Overrule Brown University And Hold That Graduate Student Assistants Who Perform Services At A University In Connection With Their Studies Are Employees Within The Meaning Of Section 2(3) Of The Act.

1. There is no support in the statute or precedent for the Brown decision.

The decision in NYU I was built on a solid legal foundation that included the language of the statute and Supreme Court and other Board precedent. That foundation remains sound today. That decision relied, first and foremost on the broad definition of "employee" in section 2(3) of the Act and on Supreme Court decisions extending a

broad reading to this statutory language. NYU I at 1205 (citing NLRB v. Town & Country, 516 U.S. 85, 91-92 (1995); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891-92 (1984); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-86 (1941)). In Town & Country, a unanimous Supreme Court held, "The ordinary dictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation,'" and the Act's definition of employee as including "any employee" "seems to reiterate the breadth of the ordinary dictionary definition." 516 U.S. at 90 (quoting American Heritage Dictionary 604 (3d ed. 1992)) (emphasis in original). In Sure-Tan, the Court held that the "breadth" of the definition of "employee" in section 2(3) "is striking: the Act squarely applies to 'any employee.'" The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals supervised by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA." 467 U.S. at 891. There is no exclusion in the statute for employees who are "also students" or "primarily students." Thus, the Board decision in NYU I was solidly grounded in the language of the statute and Supreme Court precedent defining that language.

NYU I was also consistent with established Board precedent interpreting the definition of employee. For example, in Sunland Construction Co, 309 NLRB 1224 (1992), in holding that paid union organizers are employees where they obtain jobs to try to organize other employees, the Board reaffirmed that the statute applies in the absence of an express exclusion. "Under the well settled principle of statutory construction - *expressio unius est exclusio alterius* - only these enumerated

classifications are excluded from the definition of employee." Id. at 1226. Similarly, the Board gave a broad reading to the statutory definition of employee in Seattle Opera Association, 331 NLRB 1072 (2000), enf'd 292 F.3d 757 (D.C. Cir. 2002), holding that auxiliary choristers at a non-profit opera company were "employees". Enforcing the Board's decision, the D.C. Circuit distilled the Supreme Court's and Board's broad reading of the statute and the common-law master servant relationship into a two-part test: "[I]t is clear that – where he is not specifically excluded from coverage by one of section 152(3)'s ⁹enumerated exemptions – the person asserting statutory employee status *does* have such status if (1) he works for a statutory employer in return for financial or other compensation; and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed." 292 F.3d at 762 (internal citations omitted) (emphasis in original). The decision in NYU I is fully consistent with this definition.

Most significantly, the decision in NYU I is consistent with Boston Medical Center, 330 NLRB 152 (2000), holding that medical interns, residents and fellows are "employees," despite the fact that they are also students. As in NYU I, the Board in Boston Medical based its decision on the broad language of section 2(3) and the Supreme Court decisions emphasizing that the definition encompasses anyone who works for an employer in exchange for compensation. Id. at 159-160. The Board relied upon the fact that there is no exclusion in section 2(3) for employees who are also students. The Board also pointed to section 2(12)(b) of the Act, which defines professional **employee** to include "any employee who (i) has completed the courses of specialized intellectual instruction ... and (ii) is performing related work under the

⁹ Section 2(3) of the NLRA is, of course, codified at 29 U.S.C. sec. 152(3).

supervision of a professional person....” Id. at 161. Like interns and residents, graduate assistants literally fit within this definition of professional employees: they have completed advance courses of instruction and they work under the direction of a faculty member in their field of study.

The Board in Boston Medical emphatically rejected the idea that there is some kind of inconsistency between being an employee and being a student, holding that interns’ and residents’ “status as students is not mutually exclusive of a finding that they are employees.” Id.

As ‘junior professional associates,’ interns, residents and fellows bear a close analogy to apprentices in the traditional sense. It has never been doubted that apprentices are statutory employees. . . . Nor does the fact that interns, residents and fellows are continually acquiring new skills negate their status as employees. Members of all professions continue learning throughout their careers Plainly, many employees engage in long-term programs designed to impart and improve skills and knowledge. Such individuals are still employees, regardless of other intended benefits and consequences of these programs.

Id. at 161 (citations and footnotes omitted). The holding of Boston Medical has not been questioned by the courts of appeals, has resulted in fruitful collective bargaining, and remains good law. St. Barnabas Hosp., 355 NLRB No. 39 (2010).

As the Board recognized in Boston Medical, there is simply no logical, rational basis to conclude that one cannot be both a student and an employee. Indeed, the Board has a long history of recognizing that apprentices are employees, entitled to the protections of the Act. Apprentices, by definition, are required to work as a part of their training for a craft or trade. Apprentices typically work for an employer while taking classes to learn the craft. This work provides on-the-job training that is critical to learning the craft. Apprentices generally must complete a certain number of hours of

classroom training and a specified number of years of work in the field in order to qualify as journeymen. Despite the fact that the work of apprentices is thus part of their training for a career, the Board has consistently treated such apprentices as employees.

As far back as 1944, the Board held that apprentices who attended a school as part of a 4 or 5 year training program and worked under the supervision of training supervisors for 2½ years while learning shipbuilding skills were employees within the meaning of the Act. Newport News Shipbuilding & Dry Dock Co., 57 NLRB 1053, 1058-59. Similarly, in General Motors Corp., 133 NLRB 1063, 1064-65 (1961), the Board found apprentices who were required to complete a set number of hours of on-the-job training, combined with related classroom work in order to achieve journeyman status, to be employees. See also Chinatown Planning Council, Inc., 290 NLRB 1091, 1095 (1988) (describing apprentices “working at regular trade occupations while receiving on-the-job training”), enfd, 875 F.2d 395 (2d Cir. 1989). All of these apprentices were students and employees at the same time. Their work was related to their schooling. They learned while working and earning money. The Board has never suggested that, in order to find an apprentice to be an employee, it was necessary to weigh the educational benefit that he received from working with a journeyman against the economic benefit his employer derived in order to decide whether the relationship was “primarily educational.” “[I]t has never been doubted that apprentices are statutory employees” because there is no inconsistency between working and learning. Boston Med., 330 NLRB at 161.

Like apprentices, graduate student workers are engaged in education while simultaneously performing services for an Employer designed to prepare them for their

post-graduation careers. Accordingly, it is no surprise that NYU's Faculty Advisory Committee explicitly labeled RAs, "apprentice researchers." (Er. Ex. 38). The Board's apprenticeship cases further demonstrate that a worker can be a student engaged in a course of study at the same time as he or she is an "employee" under the Act. See id.

Brown, by contrast, represents a sharp departure from existing precedent, is inconsistent with the language of the statute and Supreme Court precedent, and, as the record in this case demonstrates, produced divisive labor strife. At the outset, it is astonishing that the Board in Brown ignored the broad scope of the definition of employee in section 2(3) of the Act. This is contrary to the most fundamental principle of statutory construction. In interpreting the meaning of any statute, "[w]e start, as always, with the language of the statute." Williams v. Taylor, 529 U.S. 420, 431 (2000); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) ("[I]n all cases involving statutory construction, our starting point must be the language employed by Congress . . .") (quotation and citation omitted). The Brown majority disregarded this most basic tenet of statutory interpretation.

The Board majority in Brown purported to base its holding on two decisions involving universities, Adelphi University, 195 NLRB 639 (1972) and Leland Stanford Junior University, 214 NLRB 621 (1974). Neither of these cases lends any support for the proposition that graduate students cannot also be employees. In Adelphi, the Board did hold that teaching and research assistants were "primarily students." There is not the slightest suggestion in that decision, however, that the Board believed that this was somehow inconsistent with employee status. Rather, the Board held that student status distinguished teaching assistants from regular faculty members, so that they had a

community of interest separate from regular faculty members. “[W]e find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit.” 195 NLRB at 640. NYU I, by finding a separate unit of student employees to be appropriate, was entirely consistent with Adelphi. The Board, in Brown, did not return to Adelphi’s holding. Instead, it distorted the holding of a case that actually supports finding graduate assistants to be employees who have a separate community of interest from other employees.

Similarly, Leland Stanford did not hold that a graduate student could not be simultaneously a student and an employee. Rather, the Board found that a specific group of graduate students were not employees on the particular facts of that case. The Board found that the tax-exempt stipends received by the students from outside funding agencies were not payment for services performed for the university. “Based on all the facts, we are persuaded that the relationship of the RA’s (sic) and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer.” 214 NLRB at 623. There is nothing in Leland Stanford to support the holding of Brown that a graduate assistant cannot be an employee where the student does perform tasks under the direction of the university for the benefit of the university.

The Board in Brown cited Adelphi and Leland Stanford as support for what it characterized as a “fundamental premise”: “the Act is designed to cover

economic relationships.” 342 NLRB at 488. The Board then went on to find that student employees are not statutory employees because their relationship to the university is “primarily educational.” However, as discussed above, there is nothing in either Adelphi or Leland Stanford that would support a holding that an individual does not have an economic relationship with a university because he also has an educational relationship with the university. Neither of those cases even suggests that one cannot be both student and employee. Indeed, this false dichotomy between working and learning was forcefully rejected by the Board in Boston Medical and is inconsistent with decades of case law finding apprentices to be employees.

In the face of this precedent, the Brown majority turned to St. Clare's Hospital, 229 NLRB 1000 (1977), to provide support for excluding an entire class of employees from the protections of the Act. St. Clare's, however, was expressly overruled in Boston Medical, 330 NLRB at 152. Thus, the only case cited by the majority in Brown that supports its holding was a case that had been overruled. Rather than interpret the language of the Act and follow precedent calling for a broad reading of that language, the Brown majority relied upon a decision that had been overruled.

The factual findings by the regional directors in the instant cases establish that NYU and Poly both have an economic relationship with graduate assistants who perform services for the university, even though they are also students. The Regional Director of Region 29 made extensive factual findings regarding the economic relationship between Poly and the graduate student employees at issue

(Poly Dec. at 14-15). The Acting Regional Director of Region 2 found, “the instant record clearly shows that these graduate assistants are performing services under the control and direction of this Employer [NYU], for which they are compensated.” (NYU Dec. at 26). Indeed, the Employer in NYU concedes that graduate students who teach classes have an economic relationship to NYU and are statutory employees. Accordingly, these graduate assistants *do* have an economic relationship with a university. Thus, the exercise of jurisdiction by the Board over these graduate student employees is consistent with the “fundamental premise,” recognized by the Board in Brown. The Act covers these employees because they have an economic relationship with the University and “the Act is designed to cover economic relationships.” 342 NLRB at 488.

To summarize, the Brown decision was unsupported by the language of the statute, Supreme Court precedent, and the Board decisions upon which the Board purported to rely. The Board in Brown failed to consider the language of the statute. The Board failed to follow repeated admonitions by the Supreme Court that section 2(3) is to be read broadly. The Board cited Adelphi and Leland Stanford for the proposition that there is some inconsistency between being a student and being an employee, where there is nothing in those cases to support a finding that there is such an inconsistency. In finding this inconsistency, the Board ignored its long history of finding apprentices to be employees. Finally the Board relied upon a decision that had been expressly overruled. Clearly, the Brown decision is an outlier: a decision which cannot be reconciled with the statute or with other interpretations of the Act.

Member Hayes, dissenting from the orders granting review in these cases, reproves the Board majority for giving insufficient weight to precedent and to the need for stability and consistency in the law. “[T]here is the distinct possibility that my colleagues will change the law in this area for the third time in twelve years. Such a course would tend to undermine both the predictability inherent in the rule of law as well as the Board’s credibility.” New York University, Case No. 2-RC-23481, Order dated 6/22/12. On the contrary, it is the Brown decision that undermines the rule of law. Brown interprets a statute without consideration of the language of the statute and cannot be reconciled with other precedent. Reliance on a case that has been overruled hardly builds respect for the rule of law. Contrary to Member Hayes’s assertion, a return to the holding of NYU I would not be the third time the law changed in this area. NYU I did not change the law. No cases were overruled in NYU I. Overruling Brown would restore consistency to the interpretation and application of the Act.

2. There is no basis for the “Policy Considerations” relied upon by the majority in Brown

The Brown majority relied upon speculation that collective bargaining by graduate student workers would impair academic freedom and interfere with the student-faculty relationship. The record in this case contains evidence that contradicts those assumptions. In his dissent from this grant of review, Member Hayes describes that evidence as of “questionable value.” Attempts to denigrate the evidence in this record should not obscure a basic fact: the evidence is uncontroverted that collective bargaining does not impair academic freedom and does not interfere with student-faculty relationships. This record contains

evidence of the benefits of collective bargaining with respect to student employees, much of it from studies commissioned by NYU itself. This record also contains evidence that the speculation by the majority in Brown about the harms of collective bargaining were unfounded. On the other hand, the majority in Brown cited no evidence that collective bargaining injured student-faculty relationships or that it infringed upon academic freedom. The employers in these cases came forward with no evidence to support those concerns. NYU's expert witness testified that there is no evidence that collective bargaining causes such harm (NYU TR. 1067). Those who would dismiss the evidence that collective bargaining does not damage student-faculty relationships and does not impair academic freedom would do well to bear in mind that this is all the evidence there is on those points.

a) The experience of NYU and the UAW before the Brown decision demonstrates that collective bargaining for graduate student employees works.

In rejecting the Employer's argument that collective bargaining would infringe the academic freedom of colleges and universities, the Board in NYU I predicted that the parties could confront and resolve issues of academic freedom through the bargaining process. 332 NLRB at 1208. The record herein establishes that this was in fact what happened at NYU. As noted above, the University and the UAW entered into a collective bargaining agreement containing a Management and Academic Rights clause that explicitly guaranteed the University's academic prerogatives. NYU proudly proclaimed at the time that this clause would protect its academic freedom, and its Director of Labor Relations

testified at the hearing in this case that the clause did provide a mechanism to protect academic freedom. Thus, the experience of NYU was that the collective bargaining process does not impair the University's academic freedom.

It is also undisputed that collective bargaining had a positive impact on the economic relationship between NYU and the student workers. Studies commissioned by NYU at the expiration of the collective bargaining agreement repeatedly praised the benefits of collective bargaining on that economic relationship. This stands in sharp contrast to the impact on that economic relationship which followed the Board's removal of the Act's protection for student workers: when NYU withdrew recognition from the UAW in the wake of Brown, a strike ensued.

The experience at NYU is also consistent with the results of collective bargaining among other categories of academic employees who enjoy the Act's protection. The risk to academic freedom, if it exists, would seem to apply regardless of whether the workers seeking unionization are graduate assistants, adjunct faculty, post-doctoral researchers, or full-time faculty. Yet, the latter types of workers are recognized to be employees under the Act, and are permitted to bargain collectively - and, in fact, have done so for many years at NYU and other private universities throughout the country. See, e.g., Univ. of Great Falls, 325 NLRB 83 (1997); Lorretto Heights Coll., 264 NLRB 1107 (1982), enf'd 742 F.2d 1245 (10th Cir. 1984); Bradford Coll., 261 NLRB 565 (1982); Cornell Univ., 183 NLRB 329 (1970). Thus, concerns about academic freedom are not a legitimate reason to deny graduate assistants the right to collectively bargain. NYU I, 332 NLRB at 1208.

b) Academic Studies Undermine Brown's Assumptions About Academic Freedom and the Student-Faculty Relationship.

The majority in Brown cited no empirical data to support its assumptions that collective bargaining would harm academic freedom or student-faculty mentoring relationships. The record in this case establishes that, in fact, there is no empirical support for those assumptions. Dr. Paula Voos testified that her studies showed no differences in academic freedom or mentoring relationships between universities where student employees are represented by unions and universities without unions (NYU Dec. 24-25). A published study by Gordon Hewitt likewise showed no harm to the student-faculty relationship (NYU Dec. 25). Even the Employer's expert witness testified that there is no empirical research to support either of Brown's assumptions (NYU Tr. 1067). It is submitted that it was error for the Board to make labor policy on the basis of assumptions which lack any factual basis.

Moreover, the studies by NYU's Faculty Advisory Committee and Senate Academic Affairs Committee contradict Brown's assumptions. As noted above, while both committees speculated about potential threats to academic freedom, the record establishes that the collective bargaining process and the grievance procedure worked to protect academic freedom. Neither report suggested any harm to the student-mentor relationship. On the contrary, Directors of Graduate Studies interviewed by the Senate Committee noted that collective bargaining improved student-faculty relationships:

- Impact on recruitment:
 - 'It's positive - it reassures and impresses candidates.'

- 'It has certainly been excellent for student morale, and has contributed positively to recruitment'
- Impact on teaching
 - 'Absolutely positive. Fair and understood rules, obligations, and responsibilities have only enhanced [teaching] relations.'

.....

- Impact on quality of relationship between faculty and graduate students:
 - 'The union contract has definitely diminished areas of friction around these relationships - there's a greater professional clarity.'
- Impact on departmental morale:
 - 'Departmental morale has improved.'

(Er. Ex. 38, p. 6). The Faculty Advisory Committee also noted that improvements resulting from the collective bargaining process enhanced "the university's ability to attract top graduate students and help ensure their success." (Er. Ex. 39, p.1). Thus, available empirical evidence and the record at NYU directly contradict the assumptions upon which Brown was based. This is yet another reason why the Board should overrule Brown.

c) The experience of successful graduate assistant unionization at public universities also undermines Brown's policy rationales for denying collective bargaining rights to private sector graduate assistants.

There are "many other, established collective bargaining relationships between graduate student unions and universities" in the public sector, throughout the United

States. Brown, 342 NLRB at 499 (Members Liebman and Walsh, dissenting). These schools include: the University of California, University of Florida, University of South Florida, University of Iowa, University of Kansas, University of Massachusetts, University of Michigan, Michigan State University, Rutgers, The City University of New York, the State University of New York, the University of Oregon, the University of Washington, the University of Wisconsin, and Wayne State University. Id. at 499, n.27; see, e.g., United Faculty of Fla., Local 1847 v. Bd. of Regents, 417 So.2d 1055 (Fla. Dist. Ct. App. 1982), aff'd, 443 So.2d 982 (Fla. 1983); Kansas Ass'n of Public Employees, Case No. 75-UD-1-1992 (Kan. PERB Oct. 17, 1994); Bd. of Trustees/Univ. of Mass., 20 MLC 1453, Case No. SCR-2215 (Mass. LRC 1994); Regents of the Univ. of Mich., 1981 MERC Lab. Op. 777, Case No. C76 K-370 (Mich. ERC 1981); Mich. State Univ., 1976 MERC Lab. Op. 73, Case No. R75 D-197 (Mich. ERC 1976); State v. NY State Public Employment Relations Bd., 181 A.D.2d 391, 586 N.Y.S.2d 662 (N.Y. App. Div. 1992); Univ. of Ore. Graduate Teaching Fellows Fed'n, Case No. C-207-75, 2 PECBR 1039 (Or. ERB Feb. 1977); Univ. of Wash., Decision 8315 (Wash. PECB Dec. 16, 2003); see also Montana State University, Case No. 1020-2011 (Mont. BOPA July 27, 2011) (holding graduate assistants are employees under Montana public employee collective bargaining statutes, and directing election in unit of TAs and RAs). Although these schools are state universities rather than private ones, many are comparable to NYU in the sense that they are large, tier 1 research universities.¹⁰ There is no reason

⁹ For example, when NYU commissioned an outside "Review of the Administrative Infrastructure for Research at New York University," one of the three panel members who completed the review was from the University of Michigan, where graduate assistants have been unionized for nearly thirty years. (Pet. Ex. 12); see Regents of the Univ. of Mich., 1981 MERC Lab. Op. 777, Case No. C76 K-370 (Mich. ERC 1981). Presumably, NYU would not have commissioned the advice of the University of Michigan's Director of Sponsored Programs unless it felt that Michigan was at least its peer.

to believe that collective bargaining would have a different impact on employees at similar private sector universities.

3. Conclusion

In summary, Brown is inconsistent with the broad language of the statute and the vast weight of precedent from the Board and the Supreme Court. It is based upon assumptions that are irrelevant to labor policy, contradicted by actual experience at NYU and at public sector universities, and undermined by academic research. The decision is premised upon a perceived inconsistency between working and learning which does not exist. The Board should issue a decision in which the employee status of student employees is based upon a recognition of the economic relationship between those student workers and their employer.

B. Research Assistants Who Perform Research Work For The University And Receive Compensation From The University For Those Services Are Employees, Regardless Of whether The University Receives Funding For That Research From Outside Sources.

The Board invited the parties to address the following question:

If the Board modifies or overrules Brown, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See NYU I, supra, 332 NLRB at 1209, fn. 10, citing Leland Stanford, supra.

The Petitioner respectfully submits that the Board has never categorically held that external funding for the work of research assistants precludes a finding of employee status. Instead, there have been cases where the Board made a factual finding that certain RAs who received external funding were not employees. Those decisions were based upon the facts presented in those cases.

Here, both regional directors found that the research assistants do perform services for NYU and Poly. At NYU, the Acting Regional Director found that research is one of the main priorities of the University, that work performed by RAs funded by external grants fulfills this mission, and that the University benefits from RAs' work (NYU Dec. 20). He found that, in order to obtain external funding, the University is obligated to provide the funding agency with a grant application that includes a description of the work to be performed by all personnel funded by the grant, including RAs (NYU Dec. 20). The earnings of RAs working under such grants are treated as personnel costs (NYU Dec. 20). If a grant application is approved, then the Employer is responsible for ensuring that funds are expended consistent with the application prepared and submitted by the University (NYU Dec. 21). RAs are required to provide twenty hours per week of services in exchange for payment (NYU Dec. 21). Thus, they meet all indicia of employee status: they perform services that benefit the Employer, under the direction and control of the Employer, in exchange for compensation. See Town & Country, 516 U.S. at 90; Seattle Opera, 292 F.2d at 762; Boston Med., 330 NLRB at 159-61.

The Regional Director's findings establish that RAs also perform a service for Poly. "As a self-proclaimed 'high quality research university', one of the Employer's main products is original research. This product is so valuable that the Employer retains the right of first refusal on patents for all research breakthroughs. Consequently, the overall projects on which RAs work are a valuable commodity to the Employer." (Poly Dec. 15). Each RA's work is supervised by a faculty member to ensure that it is consistent with the terms of the faculty member's grant application (Poly Dec. 15).

Faculty supervision of RAs is also important because the publication of research conducted by RAs enhances Poly's reputation and brings prestige to the individual faculty member who supervises the RA's research (Poly Tr. 385-87). In addition to the value provided to Poly by RAs' research, the Regional Director found that RAs are compensated through Poly's payroll system for the research work that they perform, pay income taxes on that compensation, and must report on their time and effort expended on research (Poly Dec. 15). Thus, the Regional Director concluded that RAs "have an economic relationship" with the university (Poly Dec. 14). Moreover, like the RAs at NYU, RAs at Poly perform services for the university's benefit, under its direction and control, for pay, and therefore meet the definition of "employee." See Town & Country, 516 U.S. at 90; Seattle Opera, 292 F.2d at 762; Boston Med., 330 NLRB at 159-61.

There is nothing in either NYU I or Leland Stanford to suggest that RAs such as these, who have an economic relationship with a university involving the performance of services in exchange for pay, are not employees. The RAs in those two cases were found not to have an economic relationship to the university because the evidence on the record in those cases failed to establish that they performed services for the university under its direction and control. For example, in Leland Stanford, the Board concluded that the RAs worked only for the benefit of their education, receiving tax-exempt stipends that were "not determined by the services rendered." 214 NLRB at 622. In summarizing the evidence, the Board found:

Based on all the facts, we are persuaded that the relationship of the RA's (sic) and Stanford **is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer.** Rather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the

project's needs. The situation is in sharp contrast with that of research associates, who are full-time professional employees who have already secured their Ph. D. degrees and work at research under direction, typically of a faculty member. Research associates are not simultaneously students, and the objective of a research associate's research is to advance a project undertaken by and on behalf of Stanford as directed by someone else.

Id. (emphasis added). The Board in NYU I applied followed Leland Stanford to find that research assistants in the physical sciences were not employees:

For the reasons set forth by the Regional Director, we agree that the Sackler graduate assistants and the few science department research assistants funded by external grants are properly excluded from the unit. *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974). **The evidence fails to establish that the research assistants perform a service for the Employer and**, therefore, they are not employees as defined in Section 2(3) of the Act.

332 NLRB at 1209, n. 10 (emphasis added).

This finding stands in sharp contrast to the findings of the regional directors in the instant cases. RAs at NYU “are performing services for pay....” (NYU Dec. 27).

Likewise, RAs at Poly “perform work for the university that benefits the university.” (Poly Dec. 14). In short, the evidence of an economic relationship that was absent in Leland Stamford and in NYU I is present in both of these cases.

During the period between NYU I and Brown, regional directors who dealt with the issue did not interpret either Leland Stanford or NYU I as establishing a blanket exclusion of research assistants funded by external grants from the statutory definition of employee. Rather, those regional directors treated the issue as a factual one, turning on whether the RAs performed services that benefited the university, under the direction and supervision of faculty members, for which the RAs were paid. Thus, in Columbia Univ., Case No. 2-RC-22358, the Regional Director found that RAs working on

externally-funded grant projects are employees.¹¹ Although the Regional Director noted that services performed by these RAs “help [them] to develop skills and techniques that will prepare them for their dissertation research,” she also concluded that, as in the instant case, RAs “perform vital services that are necessary for the University to fulfill its obligations under its research grants, without any regard as to whether such services are related to the dissertation.” Columbia, slip op. at 19. As at NYU, these research projects were “central to Columbia’s mission, so much so that faculty research grants account for 15 percent of the University’s annual budget.” Id. at 38. Thus, the RAs’ work was “necessary to the fulfillment of the grants’ research requirements, and accordingly, must be regarded as service to the University.” Id.

Similarly, in Tufts Univ., Case No. 1-RC-21452, the Regional Director found that RAs working on externally-funded grant projects performed research necessary to complete the grant-funded project, “under the control and direction of the Tufts faculty,” and for compensation. Tufts, slip op. at 10, 37. As at NYU and Poly, “[i]n all cases . . . the research performed by the RA is work that is necessary for the purposes of the grant.” Id. Thus, as in Columbia, “there can be no doubt that RAs at Tufts perform services for the University,” and “are employees within the meaning of the Act.” Id. at 37, 38.

The fact that the university draws upon funding from external sources in order to pay stipends to RAs is not a reason to deprive the RAs of the protection of the Act. Both NYU and Poly exist, in substantial part, for the purpose of producing original research (NYU Dec. 20; Poly Dec. 15). Each university has an Office of Sponsored

¹¹ The Regional Director made this finding at the urging of the employer in Columbia, which was represented by the same attorney who represents both employers herein.

Programs (“OSP”), which assists faculty members to obtain grants to fund their research (NYU Dec. 20; Poly Dec. 12). Grants are awarded to the university on the basis of grant proposals prepared with the assistance of the OSP, by a faculty member known as the Principal Investigator (“PI”) (NYU Dec. 20; Poly Dec. 12-13). The stipends paid to RAs are treated as salaries under the terms of these grants (NYU Dec. 20; Poly Dec. 13). The PI is responsible for ensuring that the research performed by the RA is consistent with the terms of the grant (NYU Dec. 21; Poly Dec. 13). Thus, the RAs perform work under the supervision of a faculty member that helps each university to bring in funding for one of the purposes for which the universities exist. These RAs, contrary to the finding in Leland Stanford and NYU I, are performing services for the university in exchange for the pay that they receive.

There is no principled distinction between the RAs in these two cases and the RAs in Research Foundation of the SUNY, 350 NLRB 197 (2007), decided after Brown, who were found to be employees. In Research Foundation, the Board addressed the employment status of graduate students at SUNY who worked for a non-profit corporation created to manage and administer the university’s externally-funded research programs. The corporation compensated the students for work as RAs, and they were subject to the corporation’s employment policies. Id. However, the RAs were supervised in their duties by PIs who were SUNY faculty members¹² and who “often simultaneously serve as their advisers on the dissertations they must complete to be

¹² It also bears noting that in Research Foundation, as at NYU and Poly, the fact that RAs’ salaries were primarily funded via grants from governmental and outside agencies was irrelevant to the question of whether the RAs are employees. Once a grant is awarded, the grantor has no responsibility for supervising the RAs’ labor. Rather, the PI supervises the RAs, and, in Research Foundation, the RAs had an employment relationship with the non-profit corporation. Similarly, at NYU and Poly the PI supervises the RAs’ labor, and the RAs have an employment relationship with the Universities.

awarded a graduate degree from SUNY.” Id. at 199. Moreover, the RAs’ “work assignments bear a substantial relationship to their SUNY dissertations.” Id. Nonetheless, the Board held that the RAs had “an economic relationship” with the corporation sufficient to confer employee status. Id. The economic relationship identified in Research Foundation is identical to the economic relationship between RAs and both NYU and Poly.

Accordingly, the Board should find that the question of whether RAs are employees depends upon whether they have an economic relationship to the university. If they receive funding without regard to whether they perform services for the university, then they are solely students and not employees. If, as in these two cases, they perform services for the university’s benefit and under its the direction, and are paid for that work, then they are employees. Therefore, the RAs at NYU and Poly are employees.

C. The Board Should Find That Units Of Graduate Student Employees, Excluding All Other Employees, Are Appropriate In Both Of These Cases

By virtue of their status as students, graduate assistants generally share a community of interest that is separate from other university employees. As discussed above, the Board recognized the distinct interests of graduate student workers in Adelphi University, 195 NLRB at 640. Contrary to the reading given to that case by the Brown majority, the Board did not hold that graduate assistants are not employees because of their status as students. Rather, it held that they lacked a community of interest with non-student faculty members because of their status as students. Consistent with that holding, the Board should recognize that graduate student

employees have a community of interest separate and distinct from other university employees.

The labor organizations in Adelphi sought to represent a unit of full-time and regular part-time faculty members. The university argued that 125 graduate assistants, including teaching assistants and research assistants, should be included in the faculty unit. The Board discussed the similarity in graduate assistants' and faculty members' duties, and the close and regular contact between them. Despite these factors, which would normally favor inclusion of the graduate assistants in the faculty unit, the Board excluded them because of their status as students. "The graduate assistants are graduate students working toward their own advanced academic degrees, and their employment¹³ depends entirely on their continued status as such." 195 NLRB at 640. The Board listed a variety of differences in the terms and conditions of graduate assistants' employment from those of faculty members that resulted from their status as students. For example, graduate assistants were not identified as faculty members in course catalogs, and they could be elected to student-faculty committees by students, while faculty members were elected by faculty. In light of these differences, the Board concluded, "that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit." Id. In other words, because the graduate assistants were students as well as employees, they had a separate community of interest.

¹³ The use of the word "employment" in this context confirms that the Board did not see any inconsistency between employment and being a student. The Board simply recognized that status as a student had a major impact on their working conditions, which differentiated them from other employees.

In a footnote distinguishing other cases, the Board emphasized that the status of graduate assistants as students was what distinguished them from other university employees. “For, unlike the graduate assistants, the research associate [in C.W. Post Center of Long Island University, 189 NLRB 905 (1971)] was not **simultaneously a student** but already had his doctoral degree....” Id. at 640 n.8. In the same footnote, the Board distinguished Federal Electric Corp., 162 NLRB 512 (1966), which included other classifications of employees in a bargaining unit with academic teachers, by again emphasizing that because graduate assistants are students, they “do not share a similar community of interest with the faculty members....” Adelphi, 195 NLRB at 640 n.8. Rather, the Board likened graduate assistants to laboratory assistants excluded from a professional teaching unit in Long Island University (Brooklyn Center), 189 NLRB 909 (1971). These laboratory assistants worked in the science laboratories with faculty members, but they were excluded from the bargaining unit because they were master’s students working toward their graduate degrees. See Adelphi, 195 NLRB at 640 n.8. Similarly, the Board has considered “student status” in several other cases that excluded student employees from units of other university employees. See, e.g., Saga Food Serv. of Cal., 212 NLRB 786 (1974); Barnard Coll., 204 NLRB 1134 (1973); Cornell Univ., 202 NLRB 290 (1973); Georgetown Univ., 200 NLRB 215 (1972).

In summary, the Board has long recognized that graduate student employees have a separate community of interest because they are students. Their student status does not mean that they are not employees, only that they have interests that differ from those of faculty and other employees. The pattern of bargaining that has developed in the public sector also reflects the separate community of interest of graduate student

employees. Echoing Adelphi, in directing an election in a unit composed of TAs and RAs, one state agency recently noted that such employees share a separate community of interest, in part, because of the relationship between their courses of study and the work they perform for the university. See Montana State Univ., Case No. 1020-2011 (Mont. BOPA July 27, 2011). The cases cited above at page 25 all involve bargaining units entirely of composed graduate student workers in the public sector. The pattern of bargaining in the industry is one of the factors traditionally relied upon by the Board in determining community of interest. Spartan Department Store, 140 NLRB 608 (1963). Therefore, the Board should find units of graduate student employees, excluding other employees, to be appropriate for the purposes of collective bargaining.

At NYU, the Acting Regional Director's factual findings demonstrate that graduate student employees have a separate community of interest from other employees, particularly non-student adjunct professors. The Acting Regional Director found that, like the graduate assistants at Adelphi, teaching and conducting research is part of NYU graduate assistants' education (NYU Dec. 16-17, 21). Moreover, unlike the non-student adjuncts, graduate students primarily teach non-credit recitation sections of larger classes, rather than stand-alone, for-credit courses (NYU Dec. 17). And, unlike non-student adjuncts, graduate employees are recruited to teach classes based upon their areas of study and relationships with faculty members (NYU Dec. 17-18).

Graduate student employees at NYU also have a very different relationship to their departments, to the regular faculty members, and to the institution as a whole than non-student adjuncts (NYU Dec. 18). Whereas graduate students "are an integral part" of their departments, non-student adjuncts are, as the term implies, "add ons" who "play

no role in the social, political and cultural life of the department” (NYU Dec. 18). For example, like the graduate assistants in Adelphi, they participate with other students in the selection of representatives to student-faculty committees. In addition, graduate assistants may participate in the search committee process for faculty hiring, and unlike non-student adjuncts, they have a role in decisions about the curriculum, programming, and mission of their program (NYU Dec. 18).

Thus, as the Acting Regional Director found, graduate student employees are unique in that they “share educational goals and institutional concerns,” and thus “have a dual relationship with the Employer, which does not necessarily preclude a finding of employee status.” (NYU Dec. 18, 26). He concluded:

The record demonstrates that all of the graduate students share a community of interest, because their work involves a unique relationship with the full-time faculty. Whether through teaching or research, the graduate students are performing services for pay which also are in furtherance of their studies.

(NYU Dec. 27). Because of this unique, dual relationship, graduate student employees have a community of interest separate from other employees.

At NYU, a bargaining unit limited to graduate student employees is also consistent with the bargaining history. See, e.g., Grace Indus., LLC, 358 NLRB No. 62 (2012) (giving substantial weight to bargaining history in making community of interest determination); Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (2011) (“In determining whether a distinct community of interest exists, the Board considers . . . bargaining history . . .”). For five years, the Petitioner and NYU had a successful bargaining relationship covering a unit composed exclusively of graduate student employees. The unit that the Acting Regional Director found would be appropriate was

an attempt to recreate that unit, as nearly as possible. For that reason, he concluded that only graduate student adjuncts who teach non-credit courses – graduate student workers who were previously classified as teaching assistants – should be included in the NYU bargaining unit. He limited the bargaining unit in this fashion because some graduate student workers had historically been included in the adjunct bargaining unit rather than the graduate assistant unit depending upon whether the Employer had categorized their pay as a “salary” or a “stipend.” However, as the foregoing demonstrates, all graduate student employees have a community of interest separate from other employees, including adjunct faculty. Accordingly, the Board should include all graduate students who teach in the bargaining unit.¹⁴

No party claimed that other employees should be included in a unit with the graduate student employees at Poly. The record in that case also confirmed that graduate student employees have a distinct community of interest. Thus, graduate students appointed as TAs, RAs and GAs are treated differently than other Poly employees -in almost every significant respect. As Suong Ives, the Director of Human Resources for Poly, testified, while Human Resources is responsible for overseeing all aspects of the employment relationship for the University's staff, the HR Department has no responsibility for RAs, TAs or GAs.

- Human Resources is responsible for administering the recruiting program for the administrative departments, defining the rules that the departments must follow when recruiting staff, educating the supervisors on how to recruit and interview candidates, keeping records relating to the process and reporting on the process. (Poly Tr. 608, 617) For the academic departments, Human Resources monitors the program to ensure that the academic departments are following the

¹⁴ The Petitioner is also willing to proceed to an election in the unit found appropriate by the Acting Regional Director.

employment laws and relevant diversity programs. (Tr. 607 Human Resources has no involvement in the recruiting process for RAs, TAs or GAs (Tr. 607, 609).

- Human Resources drafts and issues offers of employment to Poly staff and runs background checks but has no responsibility for drafting or distributing the appointment letters to RAs, TAs or GAs or offering them such positions. (Tr. 607-08, 617);
- Human Resources establishes and analyzes compensation for the University's staff and faculty but has no role in the setting the compensation for RAs, TAs, or GAs. (Tr. 608-09);
- Human Resources is involved in the development of job descriptions for the University's administrative departments and assists with developing job descriptions in the academic departments when requested to do so, but is not involved in the development of the descriptions for the positions of RAs, TAs or GAs to the extent such descriptions exist. (Tr. 617);
- Human Resources provides new hire orientation for Polytechnic employees, but does not do so for RAs, TAs or GAs. (Tr. 653); and
- Human Resources administers performance evaluations of Poly employees, but does not do not so for RAs, TA, or GAs. (Tr. 653).

In addition, Poly has an Employee Handbook, applicable to Poly faculty and staff.

The Handbook contains rules of conduct, which set forth disciplinary procedures, and other employment policies and procedures, including benefits, leave and time off policies (Poly Tr. 610-14, 662, 664-65; Er Ex. 22). These policies are administered by Human Resources. (Poly Tr. 616 (Ives)) The Employee Handbook is distributed to all faculty and staff at the time of their hire and is available on the University's intranet, which is not accessible by students. (Poly Tr. 615; Er. Ex. 22) In addition, Poly employees are also subject to a probationary period, which does not apply to RAs, TAs or GAs (Poly Tr. 653). Thus, there are significant differences in the terms and

conditions of employment of GAs, TAs, and RAs at Poly which result from the fact that, unlike other employees, these workers are also students.

In summary, the record in both of these cases establishes that the graduate student employees at issue share a community of interest that is separate and distinct from other university employees. This community of interest is reflected in various ways in their terms and conditions of employment, but there is a single underlying factor in both cases. As a general proposition, graduate student employees working in jobs that are related to their graduate studies share a community of interest with one another that arises out of their dual status as students and employees. The Board has recognized for decades that this dual status sets graduate student employees apart from other university employees. Therefore, the Board should find that graduate student employees working in positions which are related to their education share a community of interest separate from other employees.

D. All Graduate Student Employees Appointed To Their Positions For At Least One Semester Should Be Included In Graduate Assistant Bargaining Units.

The Board has long recognized that employees hired for a limited period of time with a defined endpoint have the right to organize. See, e.g., Berlitz Sch. of Languages, Inc., 231 NLRB 766 (1977) (on call teachers); Avis Rent-a-Car Sys., Inc., 173 NLRB 1366 (1968) (employees hired to drive rental vehicles from one rental car center to another); Hondo Drilling Co. 164 NLRB 416 (1967) (employees of an oil drilling company); Daniel Constr. Co., 133 NLRB 264 (1961) (construction industry); Pulitzer Publishing Co., 101 NLRB 1005 (1952) (camera operators and sound technicians¹⁵ at a

¹⁵ Then known as cameramen and soundmen.

television station). The Board recently reaffirmed the right of temporary employees to organize in Kansas City Repertory Theater, 356 NLRB No. 28 (2010).

On the other hand, the Board routinely excludes temporary employees from units of full-time and regular part-time employees. The reason for this exclusion is that temporary employees lack a community of interest with regular employees because the term of their employment is different from that of regular employees. As the Board explained in Kansas City Repertory, temporary employees are customarily excluded from units of full-time and regular part-time employees because they have different interests as a result of their temporary status. That is, they are excluded from the bargaining unit because they lack a community of interest with employees whose employment is indefinite and ongoing, not because they do not have the right to engage in collective bargaining.

In one sense, all graduate assistants could be regarded as temporary employees, since their employment in that capacity can be expected to end when they complete their studies. In determining whether a graduate student employee is employed for a sufficient period of time in order to be permitted to vote in an election, the touchstone should be whether the duration of their employment is for such a short period of time that their interests are substantially different from the interests of other graduate student employees. As discussed above in Part III.C., graduate assistants share a community of interest separate from other employees based upon their dual status as students and employees: their employment is related to their education and to their professional careers. Any eligibility standard for the inclusion of employees in a graduate assistant bargaining unit should reflect this dual status.

An appointment of at least one academic semester reflects the dual interest in employment and education that defines the community of interest among graduate assistants. The customary practice at both NYU and Poly – and at Brown, Columbia, and Tufts, as evidenced by the Board’s and Regional Directors’ decisions in these cases—is to appoint graduate assistants to positions as TAs, RAs or GAs for a period of at least one semester. This reflects the fact that the business of a university is conducted in semester-long work units. Undergraduate students are a university’s primary consumers or customers, and they purchase the university’s services on a semester basis. The university, in turn, appoints its graduate assistants to work in semester-long units. Thus, student employees who receive appointments of at least one academic semester should be included in a unit of graduate assistants.

While Poly has argued that San Francisco Art Institute, 226 NLRB 1251 (1976) and Saga Food Service of California, 212 NLRB 786 (1974) require a finding that the TAs and GAs at Poly are not employees, those cases actually support a finding that graduate assistants appointed to jobs lasting at least one semester share a community of interest. The principal holding of San Francisco Art Institute and Saga is that student employees lack a community of interest with other university employees because they are students. In San Francisco Art Institute, the Board found that art students working as janitors at the school in which they were enrolled did not have the right to organize because they lacked a “sufficient interest in their conditions of employment to warrant representation....” 226 NLRB at 1252. In Saga, students at UC Davis were found to lack sufficient interest in jobs as cafeteria workers. It is questionable whether this aspect of the holdings of those two cases can be reconciled with Kansas City

Repertory, where the Board held that it is for the employees to decide whether they have enough interest in their jobs to engage in collective bargaining. However, it is not necessary to reach that issue in this case, because, unlike student janitors at an art institute, graduate assistants **do** have an interest in their employment. Their jobs as TAs, RAs and GAs are related to their professional development and their long-term careers, so that they have an ongoing interest in their conditions of employment. However, the principle holding of San Francisco Art Institute and Saga is that student status is a significant factor to be considered in defining bargaining unit scope. Thus, it is consistent with those cases to define eligibility to vote on the basis of the academic calendar.

The record at Poly illustrates how an appointment for an academic term is indicative of a shared interest in employment that is related to graduate education. Master's students at Poly are appointed for a semester to GA positions in the GSET program (Poly Dec. 8). As the Regional Director explained in detail, the GSET Program is designed to ensure that the work performed by the GAs helps to prepare them for careers following completion of their degrees (Poly Dec. 5-6). A majority of GAs work at least two semesters (Poly Dec. 8, fn. 12). A student's employment as a GA ends when she completes her studies (Poly Tr. 564), but it is not unusual for a student to pursue a PhD at Poly after completing her master's degree, and therefore progress to a TA position (Poly Tr. 213, 309). TAs at Poly are generally first year PhD students who work in laboratories run by the university to teach undergraduate students how to conduct laboratory work (Poly Dec. 8-9). After completing their coursework and exams, TAs can progress to positions as RAs, where they conduct research under the direction of a PI

(Poly Dec. 10-11). RAs and TAs receive letters of appointment for periods of two semesters (Er. Ex. 26, 27). Thus, there is a natural progression from GA through TA to RA, with employees appointed to their positions on at least a one semester basis.

In summary, it is customary in academia to appoint graduate assistants to positions on a semester basis. Establishing a one semester appointment as the minimum necessary for inclusion in a graduate assistant bargaining unit reflects the community of interest that graduate student employees share because of their dual status as students and employees. This also reflects the business of a university, which provides services on a semester basis.¹⁶ Therefore, the Board should include student employees with appointments of at least one academic semester in graduate assistant bargaining units.

IV. CONCLUSION

The Brown decision suffers from many serious flaws. It ignores the language of the statute that it purports to interpret. It disregards Supreme Court and Board precedent concerning the meaning of that language. It relies upon precedent that has been overruled. And, it relies on unsubstantiated and unsupported speculation about damage that collective bargaining might cause to academic freedom and student-faculty relationships – damage that is directly refuted by the experience at NYU and available empirical evidence. These flaws are more than enough reason to overrule Brown.

Brown also suffers from a fundamental logical flaw that has tremendous potential to distort thinking about academic employment. The decision posits an inconsistency between student status and employee status that leads to an unworkable test. There is

¹⁶ A different formula might be appropriate at a university which follows an academic calendar based upon some period other than a semester, such as an academic quarter.

simply no reason why one cannot be both a student and an employee at the same time. We all have several identities including our personal, family, demographic and job characteristics. No one would think to question whether someone can be both a father and an employee at the same time, or to create a balancing test to try to determine whether an individual is “primarily” a father or “primarily” an employee. It is easy to recognize that a man can be both, at the same time, without any inconsistency between the two roles.

There is likewise no inconsistency between being a student at a university and being an employee at the same institution. If anything, as in the apprenticeship context, the roles reinforce one another. By its nature, work in an advanced field of learning requires constant learning over a career. Work performed by graduate assistants, whether teaching or research, is just the first step on that career path.

Once it is accepted that there is no inconsistency between student status and employee status, it is natural to consider how being a student at the same university where one is employed affects working conditions. It seems that all sides in this debate recognize that student employees have a different relationship to the university than non-student employees. It therefore makes sense to find that student workers have a separate community of interest from other employees, and are entitled to be represented in a separate bargaining unit. It also follows that a standard for the inclusion of temporary employees in an graduate assistant bargaining unit should take into consideration the dual status of student employees.

Based upon the foregoing, the Board should

1. Overrule Brown and restore the right of graduate student employees to engage in collective bargaining;
2. Hold that whether RAs funded by external grants have the right to engage in collective bargaining depends on whether they are common law employees, like other employees. That is, whether they perform services that benefit their university, under the direction and supervision of a faculty member, for which they are paid;
3. Hold that a bargaining unit composed of graduate students employed at the university where they are enrolled is presumptively appropriate; and
4. Find that graduate student employees appointed to work for at least one academic semester are included in such a unit.

RESPECTFULLY SUBMITTED,

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